

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHARON R. LALLMAN
Claimant

VS.

U.S.D. 501

Self-Insured Respondent

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Docket No. 1,035,420

ORDER

Claimant requests review of the November 12, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. Patrick M. Salsbury, of Topeka, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and considered the same record as did the ALJ.

ISSUES

The ALJ denied claimant's request for additional medical treatment, finding no evidence that additional treatment would cure and relieve the effects of claimant's accidental injury from six years ago. The ALJ determined that, even though claimant had undergone significant medical treatment over a six year period, claimant came to the preliminary hearing contending she was worse than before. The denial of additional medical treatment is not before the Board in this appeal.

Claimant requests review of the denial of psychological treatment. The ALJ ruled the specific request for psychological treatment for claimant was denied because there was no evidence to relate her psychological condition to the work accident. Claimant argues her depression and anxiety are preventing her improvement and curing process, and that it was a mistake not to allow treatment for her depression and anxiety when it was

requested in 2009 and 2010. Claimant requests treatment with Dr. Eyman so she can finally recover from her injury.

Respondent contends the Board lacks jurisdiction to consider an appeal of a preliminary order relating only to medical treatment. Therefore, the Order denying further psychological treatment should be affirmed.

The issues on appeal are:

1. Does the Board have jurisdiction over this appeal from a preliminary hearing?;
2. Was the ALJ correct in denying treatment for psychiatric issues?;
3. Did the ALJ abuse her discretion by ignoring the evidence of her own Independent Medical Evaluation physician who said treatment was directly related to the work incident?

FINDINGS OF FACT

Claimant, a substitute teacher throughout the U.S.D. 501 school district, was injured on May 10, 2007, while working for U.S.D. 501 Substitute Services. She was teaching a physical education class at Topeka High School, and was giving final instructions to the students for their final exam, when, while looking down at a clipboard, she was struck in the face by a dodgeball. The impact knocked her glasses off her face, and the clipboard fell out of her hand. Both the glasses and the clipboard fell to the floor. The ball struck claimant's face in the right cheekbone, lip and eye area. Claimant acknowledged that it hurt, stung, and it jolted her neck. Her face was swollen, and her glasses were bent. Claimant alleged her glasses were broken. However, when claimant took her glasses to Ophthalmology, P.A., they required only adjusting, not replacement. Respondent contends that the ball was spongy much like a Nerf ball, and weighed 4.2 ounces.

Claimant testified that when she went home that night, she had a very bad headache and her teeth hurt, and she was having pain in her jaw and neck. Claimant has had a bridge, encompassing six teeth on her upper jaw, since the age of 9. Her dentist is Jack E. Ferguson, D.D.S.¹ The last time she saw Dr. Ferguson prior to the May 10 event was in December 2006, for a general checkup and cleaning. Dr. Ferguson did all of the prior work on claimant's bridge. The bridge was not loose at the time of the December 2006 visit. Claimant had her bridge replaced two or three times before the accident. The last time she had her bridge replaced was more than 4 or 5 years prior to the accident.

¹ Dr. Ferguson is a general dentist, who also works with people who have environmental sensitivities. This is called biological or environmental dentistry.

Claimant had no problems with it until the May 10 accident. Claimant testified that the problems with her bridge started on May 10, after the impact with the ball.

Steven Grammar, the associate principal and athletic director, saw claimant shortly after the May 10 incident occurred. He testified claimant was very upset, stating she had been hit with a ball. Mr. Grammar initially indicated claimant said the ball struck her in the left temple. When asked if claimant said the ball struck her anyplace else, Mr. Grammar responded "no."

Claimant refused treatment by the school nurse, stating she was fine. Mr. Grammar asked her about filling out an incident report, but claimant said she could not fill out an incident report because she could not see without her glasses. When Mr. Grammar was asked what claimant told him as far as where she was hit, Mr. Grammar pointed to the left temple. He remembers that it was in the temple area, although it could have been the right temple. He testified that claimant pointed to the temple.

The next morning, claimant called Casey Crawford at Substitute Services and was sent to Dale Garrett, M.D. Respondent contends that Dr. Garrett's May 11 record states that claimant was hit in the "head" with the ball. However, in Dr. Garrett's May 11 report, under the history, it states that claimant was hit in "the right side of the face with a ball." Dr. Garrett's initial diagnosis was a mild contusion to the right side of her face.²

After being hit in the face by the ball, claimant noticed the bridge in the upper right side of her jaw was loose. Claimant testified she talked to Dr. Garrett about her teeth, including the fact that the bridge was loose, and Dr. Garrett told her to go to a dentist. Over the next few days, the bridge got progressively looser.

Claimant saw Dr. Garrett a total of five occasions. According to Dr. Garrett's records of May 11, May 14, May 18, May 25, May 31 and June 7, 2007, he told claimant to see a dentist for a bite guard. In his May 31 and June 7 reports, Dr. Garrett mentions a non-occupational bite guard. Claimant had not used a mouth guard (bite guard) in the year before this event occurred. Dr. Garrett released claimant from his care on June 7, 2007, finding she had suffered no permanent impairment from this accident. During the examination, Dr. Garrett noted all 5 Waddell's signs were positive.

Claimant testified that she called Sandra Deines, workers compensation administrator for U.S.D. 501, and described to Ms. Deines what was happening. Ms. Deines told claimant to go to her own dentist, which was Dr. Ferguson.

The first time claimant saw Dr. Ferguson following the May 10 incident was on May 29, 2007. She also saw Dr. Ferguson on June 5 and June 19, 2007. Dr. Ferguson

² P.H. Trans. (Aug. 29, 2007), Cl. Ex. 1 at 29, 32.

wrote, in a letter dated July 12, 2007, that claimant was seen in his office on May 29, and that she “reported being hit in the face by a dodgeball.”

In the July 12 letter, Dr. Ferguson opined the ball, identified as a “Voit Allaround” ball, is of sufficient hardness to have caused trauma to claimant’s jaw. It is significant that Dr. Ferguson had the opportunity to examine the ball.

Claimant was seen by Phillip L. Baker, M.D., on August 7, 2007. Dr. Baker, in his report of August 13, 2007, opined the ball could not cause an injury such as claimant is alleging. Claimant argued that Dr. Baker was not qualified to give such an opinion as he does not treat bones in the mouth.

Respondent argues that when claimant was seen by a chiropractor on May 16, 2007, she reported that she was hit in the “right temporal region with a dodge ball.”³ In her June 10, 2007, statement to the school board, claimant wrote that “several of the students were sitting on the floor listening to my instructions for their final exam when I was hit in the head by the dodge ball.”⁴

Claimant was referred by Dr. Ferguson to oral surgeon, John P. Tanner, D.D.S., M.D., of the Facial Surgery Group. In the answers to the TMJ Questionnaire (which claimant completed on July 24, 2007, prior to seeing Dr. Tanner), claimant wrote “I was hit in the head by a dodgeball.”⁵ On the Patient Information Sheet dated July 24, 2007, claimant wrote, “I was hit in the head with a dodge ball. I was hit on the right side of my face/head.”⁶ In his July 24, 2007, letter, Dr. Tanner wrote that claimant told him she “was struck in the face by a ball.”⁷ Claimant’s attorney wrote Dr. Tanner on August 22, 2007, asking for a response to whether claimant’s symptoms, diagnosis and need for treatment were causally related to the ball hitting her in the face. The response, signed by Dr. Tanner and dated August 25, 2007, was answered in the affirmative.

Respondent placed into the record the Affidavit of Terrence M. Babilla, General Counsel of Sport Supply Group since March 1995. In his affidavit, Mr. Babilla stated that, since March 1995, he has handled all of Sport Supply Group’s product liability claims. During that time, he was unaware of anyone being injured by the Voit Allaround Ball.⁸

³ P.H. Trans. (Aug. 29, 2007), Resp. Ex. A at 1.

⁴ P.H. Trans.(Aug. 29, 2007), Resp. Ex. B at 1.

⁵ P.H. Trans. (Aug. 29, 2007), Resp. Ex. C at 4.

⁶ P.H. Trans. (Aug. 29, 2007), Resp. Ex. C at 2.

⁷ P.H. Trans. (Aug. 29, 2007), Cl. Ex. 1 at 16.

⁸ P.H. Trans. (Aug. 29, 2007), Resp. Ex. I.

Regarding the ball that struck claimant, Mr. Grammar stated that they never had an injury from the use of that type of ball. Claimant's biggest concern when Mr. Grammar was talking to her on that day, after the accident happened, was that her glasses had been broken. She also was embarrassed.

The ALJ had the opportunity to hold and examine the ball at the preliminary hearing. Additionally, claimant took the ball to Dr. Ferguson and to Dr. Tanner. Both Dr. Ferguson and Dr. Tanner considered the ball when giving their opinions about what caused claimant's problems.

Dr. Ferguson referred claimant to J. Michael Randall, D.D.S. A report from Dr. Randall dated August 28, 2007, reflects a history of being "hit in the mouth/face by a dodgeball." In that report, Dr. Randall opined that based on the history and clinical examination, he does indeed believe claimant's trauma from May 10, 2007, contributed to the pulpal pathosis of claimant's teeth.

Dr. Ferguson testified he was given the opportunity to view the ball that hit claimant in the face and described it as a kind of Nerf ball with a covering over it. He testified the first time he met with claimant was in September 1999 on referral for some bridgework on the upper anterior. Dr. Ferguson noted claimant had some teeth extracted prior to his visit with her and he was tasked with providing her with a permanent bridge. Afterwards, Dr. Ferguson provided claimant periodic cleaning, exams and maintenance over the years. The last time he met with claimant before the accident, in December 2006, she had some gum line sensitivity and before that some light popping in her right TMJ.

Dr. Ferguson testified that when claimant came in after the accident, he worked with her to control her symptoms and to get her relief. His diagnosis was trauma that put claimant's TMJ out of alignment and trauma to the bridge that caused the supporting bridge for the nerves in the teeth to die. Claimant's bridge was mobile or loose at the time of this visit.

Although Dr. Ferguson did not want to provide an opinion on the cause of claimant's TMJ, he noted that her more serious teeth problems began after the May 2007 event.

In November 2008, claimant was referred to Dr. Robert L. Mason, D.D.S., for treatment of her several tooth problems. Claimant underwent several tooth extractions, obtained a permanent bridge and was treated for a yeast infection with her primary care physician. The treatment successfully eliminated gum bleeding and reduced her tooth sensitivity. According to Dr. Mason, by January 30, 2009, claimant had concluded her oral surgery and was improved in her oral situation. Dr. Mason advised claimant would someday need crowns on tooth numbers 5 and 6 and a partial plate or permanent implant. As of his last examination, he determined claimant was no longer in need of pain medications.

However, when claimant was referred to Talal W. Khan, M.D., the Director of Pain Management at KU Medical Center, in Kansas City, on February 20, 2009, claimant reported persistent pain, problems opening her jaw and unbearable pain. Eating, chewing and talking all made the pain worse, along with several other activities. Claimant reported severe pain in her neck, face, head, upper back, mid thoracic interscapular area, low back with radiation into her upper extremities and pins and needles in her hands and stabbing pain in her face.

Robert Schulman, Ph.D., a clinical psychologist, testified he met with claimant on February 26, 2009, for an evaluation, at the request of her attorney. Dr. Schulman testified that he was aware claimant was taking psycho-active medications before the accident, but he was not aware of the start date of those drugs or the amounts she was taking. Dr. Schulman noted claimant's longstanding problems with her teeth which were exacerbated by the May 10, 2007, accident with the dodgeball. He also noted claimant was already uneasy on the date of the accident, because of aggressive acts that had been going on in the school, which required a security presence from time to time. Dr. Schulman noted claimant began having a variety of medical issues and infections following the accident. Claimant alleged that she lost 45 pounds from difficulty eating. She was taking a variety of pain medications and medication for depression and anxiety.

Claimant complained of daily headaches, poor sleep and difficulty eating. She complained of difficulty obtaining treatment and her inability to leave her house and a fear of driving which reduced her social activities. Claimant was afraid someone was trying to kill her. Dr. Schulman did not relate this to the dodgeball hitting claimant in the face. Dr. Schulman described claimant as someone who is reclusive, isolated and fearful of functioning, which claimant related to the atmosphere at the school where she was hit in the face.

Dr. Schulman opined claimant had severe anxiety and depression. He diagnosed claimant with Posttraumatic Stress Disorder, (PTSD) finding claimant had experienced a life threatening event. Claimant had lost interest in life activities and felt hopeless and despair, and related this to the accident. Dr. Schulman opined claimant had debilitating anxiety and depression as a result of a traumatic event while working as a substitute teacher. He felt claimant was using appropriate medication, but should be monitored and supervised. He also felt claimant would benefit from behavioral treatment including behavioral desensitization treatment specifically designed to help relieve anxiety resulting from traumatic incidents. Dr. Schulman indicated that simply being startled by something does not fit the definition of posttraumatic stress disorder, unless there is anxiety and fear of death or serious injury at the time of the event. He believes claimant was scared by May 10, 2007, event.

Claimant met with James Eyman, Ph.D., for a court-ordered Independent Psychological Evaluation, in September and October 2009. Dr. Eyman indicated in his report that claimant reported being upset and frightened because of the incident. Dr.

Eyman described claimant as “a very psychologically distraught woman who is significantly distressed by her health concerns, very depressed, quite anxious and tense, excessively worried, overly suspicious and feeling misunderstood.”⁹ He determined claimant had limited capacity to manage difficult and stressful situations. In his opinion, claimant channels her psychological distress into developing, or intensifying, physical symptoms and complaints. She has a distorted view of her physical functioning.

Dr. Eyman came to the conclusion that the credibility of claimant’s complaints is questionable, given the psychological testing which clearly indicated she was exaggerating her physical and psychological symptoms. He felt claimant’s psychological symptoms are a combination of her dealing with the demands of life by developing physical and psychological symptoms. He also stated claimant had been receiving treatment for depression and anxiety at the time of her accident. He opined claimant continued to be severely depressed and anxious. Dr. Eyman felt claimant is in need of intensive long-term psychotherapy with a psychiatrist and not her primary care physician.

Claimant testified about her dental issues and need to continue with treatment. She has issues with TMJ and depression from the pain of TMJ. Claimant believes that if she can receive treatment for her depression she would be able to process everything and would get better. Claimant testified she thinks about her injury all day and is in continuous pain. She was told by her pain management physician that pain goes in cycles with depression and that TMJ affects breathing, swallowing (done 2,000 times a day), eating and everything done with the mouth. Claimant testified that she sleeps most of the time. Claimant is on a myriad of medications and uses pain patches all over her body. Claimant also takes Xanax for anxiety and stress.

Claimant was referred for treatment by Dr. Laudie, D.D.S. However, the two dentists who were approached would not accept the fee schedule. Another dentist, Dr. Bolding, D.D.S., of Fayetteville, Arkansas, accepted the fee schedule and has agreed to see the claimant. Claimant is seeking authorization to make the 5 hour trip to see Dr. Bolding.

Kenneth Lallman, claimant’s husband, was asked to testify to claimant’s issues related to her alleged depression, which she relates to the accident. Mr. Lallman testified that since the accident, claimant has been withdrawn and sleeps most of the day. He testified claimant is afraid of getting hit again and reinjuring her mouth. He believes if her focus can be taken away from the injury claimant would improve.

Claimant was referred to Kathleen Keenan, Ph.D., for a psychological evaluation and determination of the following: Does claimant have a psychological disorder; Was the disorder caused or substantially aggravated by her workers compensation injury; Does

⁹ Dr. Eyman’s Independent Psychological Report at 6.

claimant need psychological or psychiatric treatment; and Is the need for such treatment substantially related to her workers compensation injury?

Dr. Keenan's report discussed in great detail, claimant's injury history and the history of her treatment both for claimant's dental and physical complaints, as well as the psychological evaluations of claimant to that point. Under her supervision, claimant underwent numerous psychological tests. The MMPI-2 indicated claimant was exaggerating her symptoms, endorsing a large number of highly unusual psychological problems. Claimant's FBS (Fake Bad Scale) was extremely elevated.

Dr. Keenan found claimant was suffering from a number of psychological problems that are acute in nature as well as long-term or characterological. Dr. Keenan felt claimant was severely depressed and had a tendency to exaggerate all of her symptoms. Claimant had passive thoughts of suicide and reported being addicted to her narcotic pain medication. Dr. Keenan noted claimant was receiving narcotic medicine from several sources.

Dr. Keenan noted claimant suffered from nightmares, problems sleeping, mood swings, daily depression, decreased memory, migraine headaches, TMJ, and several other conditions, per the intake questionnaire presented to Dr. James W. Willoughby, D.O., in 2005. Claimant also reported being fatigued "all the time." Claimant reported continuous pain in her neck, upper back and lower leg.¹⁰ This information was not made available to Dr. Schulman at the time of his initial evaluation of claimant. Additionally, Dr. Keenan, while somewhat agreeing with the diagnosis of PTSD by Dr. Schulman, disagreed as to the cause of the condition. She noted the event with the ball did not constitute a life threatening situation and claimant's initial reaction to the incident did not fit a PTSD pattern. The condition more likely came as the result of claimant's childhood where she grew up with an abusive, alcoholic father. Claimant answered "True" to the question regarding being kicked, hit, or beaten by a family member or loved one.¹¹

Dr. Keenan found claimant suffered from significant emotional illness, not caused or exacerbated by the incident on May 10, 2007. Claimant was diagnosed as a somatizer,¹² meaning when stressors in life get to be too much, claimant develops, exacerbates and/or exaggerates her physical symptoms. Claimant is in need of psychological treatment, but workers compensation should not pay for this as it would be counterproductive. Dr. Keenan opined claimant had used the incident to explain, justify and to try and make sense of her problems, and therefore had exacerbated both her

¹⁰ Willoughby Depo., Ex. 2 at 11.

¹¹ P.H. Trans. (Nov. 12, 2013), Resp. Ex. A at 35 (Dr. Keenan's June 2009 Report).

¹² P.H. Trans. (Nov. 12, 2013), Resp. Ex. A at 38 (Keenan's June 2009 Report).

physical and emotional problems. She has literally made a mountain out of a mole hill and catapulted a minor injury into a major disability.

Dr. Keenan believes claimant is in need of ongoing and long-term psychological treatment. According to Dr. Keenan, this need is not related to her injury and if workers compensation were to provide this treatment it would only prolong and justify claimant's dependence and would be counterproductive.

Claimant reported to several specialists that she had lost weight (up to a maximum of 65 pounds as reported in Dr. Keenan's report) due to her inability to chew, primarily because of the TMJ symptoms. This claim, while substantially exaggerated, was initially partially accurate. When claimant was first examined by Dr. Garrett on May 11, 2007, shortly after the accident, she weighed 154 pounds. By July 29, 2009, Travis Oller, D.C. reported claimant's weight at 123 pounds. However, by February 26, 2010, Dr. Mead reported claimant's weight had increased to 130 pounds. In December 2011, Dr. Sankoorikal noted claimant's weight at 162 pounds. And, at the time of Dr. Sankoorikal's examination on November 7, 2013, claimant weighed 166 pounds, 12 pounds heavier than at the time of her accident in 2007. This weight gain began shortly after claimant was released by Dr. Mason, with a positive report on the condition of her teeth. Yet claimant came to the November 12, 2013, preliminary hearing requesting treatment for alleged ongoing TMJ problems (the primary cause of her inability to chew), pain management and depression. Additionally, even with years of ongoing medical and dental treatment, claimant testified her pain had increased.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 44-508(g) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on a issue is more probably true than not true on the basis of the whole record.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?¹³

This Board Member must first consider whether the Board has jurisdiction to consider the issue dealing with claimant's need for psychiatric issues allegedly stemming from the accident on May 10, 2007. Respondent contends the Board has, in the past, determined it lacked jurisdiction to address a psychological condition on an appeal from a preliminary hearing, citing a November 2005 Board decision in *Bortzer*.¹⁴ Respondent is correct that, at one time, the Board was reluctant to take jurisdiction of psychological issues on appeal from preliminary orders. The Board, since that time, has reconsidered the issue of psychological treatment and whether it is solely a question of medical care, or whether it can also give rise to questions that would be jurisdictional for the Board to consider on appeal from a preliminary hearing Order. The Board has more recently determined that it has jurisdiction over the issue of psychological referrals at preliminary hearings as the question of whether a psychological condition is directly traceable to the work-related accident is a question that goes to the compensability of the condition or injury.¹⁵ Accordingly, the Board takes jurisdiction of this appeal on that limited question of whether claimant has a psychological condition that is directly traceable to her work-related accident and the resulting physical injury.

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.¹⁶

¹³ K.S.A. 44-534a(a)(2) (Furse 2000).

¹⁴ *Bortzer v. CLW Trucking*, No. 1,024,101, 2005 WL 3408014 (Kan. WCAB Nov. 30, 2005).

¹⁵ *Myrie v. Logistics & Environmental Support Services*, No. 1,025,825, 2007 WL 4296019 (Kan. WCAB Nov. 13, 2007).

¹⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

This Board Member, in a decision rendered on November 15, 2007, determined, based upon the opinion of Dr. Ferguson, that claimant's need for dental treatment was the result of the injuries suffered on May 10, 2007. However, claimant's need for dental treatment, even though again raised, is not before the Board as claimant has acknowledged a lack of jurisdiction over those issues on appeal from a preliminary hearing. The issue of claimant's need for psychological treatment was not raised at that time. Additionally, no jurisdiction was taken over the question of claimant's need for psychological treatment in the Board's decision of April 27, 2010. However, the issue at that time was not whether claimant had suffered a psychological injury, but whether claimant was in need of psychological treatment.

The issue before this Board Member at this time is whether claimant's psychological condition is related to the work accident. As noted above, over this issue, the Board has jurisdiction.

The Kansas Court of Appeals has set certain criteria which must be met before benefits for a traumatic neurosis can be awarded in a workers compensation situation. As set forth in *Love*,¹⁷ the following elements must be met for a traumatic neurosis claim to be compensable:

1. A physical injury;
2. Symptoms of traumatic neurosis; and
3. These symptoms are directly traceable to the physical injury.¹⁸

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems, are compensable. "It is firmly established in this jurisdiction that traumatic neurosis, following physical injury and shown to be directly traceable to the injury, is compensable under the Workmen's Compensation Act."¹⁹

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment."²⁰

¹⁷ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557, *rev denied* 245 Kan. 784 (1989).

¹⁸ *Id.* at 398.

¹⁹ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

²⁰ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973).

It is not disputed that claimant was injured on May 10, 2007, although the extent of that injury is in dispute. The dispute before the Board at this time centers around claimant's alleged mental health concerns and the need for treatment of those concerns. Claimant alleges her need for mental health treatment stems solely from the accident. Respondent quickly points out the abundant preexisting problems displayed by claimant, both physical and psychological.

The ALJ had the opportunity to observe this claimant during several hearings leading to the November 12, 2013, preliminary hearing. The ALJ then ruled against claimant, citing the opinion of Dr. Keenan as the most persuasive. This Board Member finds the opinion of the ALJ to be correct. First the ALJ had the opportunity to observe and determine claimant's credibility on several occasions. Apparently claimant was found to be lacking. This finding is significant in litigation where claimant has been identified as a possible malingerer by more than one health care provider, and on one occasion, was found to have violated all 5 Waddell's signs. Also, this Board Member finds it disconcerting that claimant could be so improved with Dr. Mason in January 2009, and yet be in such tremendous pain with Dr. Kahn in February 2009.

This Board Member finds claimant has failed to prove her need for psychological treatment is directly traceable to the physical injury of May 10, 2007. The denial of psychological treatment by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove her need for psychological treatment is directly traceable to the physical injury of May 10, 2007.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated November 12, 2013, is affirmed.

²¹ K.S.A. 2012 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
bruce@brucebrumleylaw.com
johnna@brucebrumleylaw.com

Patrick M. Salsbury, Attorney for Self-Insured Respondent
psalsbury@goodellstrattonlaw.com

Rebecca Sanders, Administrative Law Judge